

No. 11179

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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F. S. LACK,

*Appellant,*

*vs.*

WESTERN LOAN AND BUILDING COMPANY, a corporation,

*Appellee.*

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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APPELLANT'S OPENING BRIEF.

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HARRY W. HORTON,  
218 Rehkopf Building, El Centro, California,  
*Attorney for Appellant, F. S. Lack.*



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## APPELLANT'S OPENING BRIEF.

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### Statement Concerning Transcripts and Records of This Appeal.

This appeal necessitates a review of the record and transcripts in cases numbered 10158 and 10730, each, F. S. Lack vs. Western Loan and Building Company, and the transcripts in this cause number 11179. By stipulation and to avoid the reprinting of the transcripts in cases 10158 and 11730, the transcript on this appeal incorporates by reference the transcripts in the two other cases. (See Stipulation, p. 27.) The original transcript herein by error did not contain an essential part of the record and, therefore, a Supplemental Transcript was necessitated. The transcripts involved in this appeal as

the record herein, therefore, consist of the transcript and supplemental transcript in this case number 11179 and the transcript in case number 10158 and the transcript in case number 11730.

### Statement of Pleadings and Facts Disclosing Jurisdiction of District Court.

September 6, 1934, Lack offered, in writing, to purchase from Western Loan and Building Company, a Utah corporation [Tr.10158, p. 2] (hereinafter referred to as "Western"), the Dunlack Hotel at Brawley, California, for \$35,000.00. [Tr. 10158, p. 715.] This offer resulted in a written contract between the parties, termed and claimed by Lack to be a contract of sale and by Western a lease [Tr. 10158, p. 34], for the consideration of \$35,000.00. While the contract was in force an earthquake occurred on May 18, 1940. Lack had taken out insurance against earthquake [Tr. 10158, p. 139] with the Pearl Assurance Company, Ltd., a corporation organized under the laws of England. [Tr. 10158, p. 2.] Lack was a resident of California. [Tr. 10158, p. 3.] Western claimed Lack's contract terminated and claimed the insurance. Lack claimed the contract in force and the insurance money. Western filed suit in the District Court (Case No. 1301-B), for the total of the insurance money, making Pearl Assurance Company as a party defendant and to quiet title as against Lack as to the Dunlack Hotel property, jurisdiction being predicated on divergency of citizenship and the controversy exceeding \$3,000.00 [Tr. 10158, p. 2] and Pearl Assurance answered [Tr. 10158, p. 21] and deposited \$28,067.87 insurance money with the District Court. [Tr. 10158, p. 75.]

Lack, in turn, filed suit in the Superior Court in California against Western to establish his right under the contract and for specific performance and for damages [Tr. 10158, p. 27] and the case was removed to the District Court [Tr. 10158, p. 58] as case No. 84 S. D. The cases were consolidated in the District Court and Findings and Judgment entered against Lack and in favor of Western. [Tr. 10158, pp. 76 and 90.]

Jurisdiction of the District Court was established by Section 41 of Title 28 of U. S. Code.

An appeal was taken from the Decree of the consolidated cases, resulting in a reversal as found in case number 10158 of this Court and as reflected in its opinion in *Lack v. Western*, reported in 134 F. (2d) 1017.

Upon the return of the matter to the District Court an Interlocutory Decree was entered. [Tr. 10730, p. 12.] Thereafter on behalf of Lack a motion was made to re-settle and amend the Interlocutory Decree and for other relief [Tr. 10730, p. 19] and Western made a motion to strike portions of Lack's proceedings [Tr. 10730, p. 25] and Western's motion was granted and Lack's motion denied. [Tr. 10730, p. 31.] Lack attempted an appeal from the Interlocutory Decree and from the orders last mentioned [Tr. 10730, p. 32], which appeal was dismissed by this Court on the grounds that the Interlocutory Decree and the Orders appealed from were not final and, therefore, an appeal therefrom would not lie. This Court's decision being set forth in *Lack v. Western*, 146 F. (2d) 852.

Thereupon the following proceedings were had in the District Court: On behalf of Lack, Findings of Fact and Conclusions of Law were served and offered for settlement and signing [Tr. 11179, p. 35 Sup. Tr.] and

noticed for presentation [Tr. 11179, p. 9] and a Final Decree was served and offered for settlement and signing. [Tr. 11179, p. 2.] The District Court rejected all findings, conclusions of law and refused to make any findings or conclusions of law and entered what is termed a "Final Judgment" [Tr. 11179, p. 12] on July 2, 1945. Lack served and filed his notice of appeal from that "Final Judgment" and from the District Court's orders more particularly hereinafter referred to,—doing so on September 28, 1945. [Tr. 11179, p. 17.]

Jurisdiction of this Court on this appeal is claimed under Title 28, Section 225a of U. S. Code.

### Statement of Case and Questions Involved.

The pleadings in the consolidated cases in the District Court included in Lack's complaint against Western [Tr. 10158, p. 27] not only the issue as to the insurance money, but an issue of damages [Tr. 10158, pp. 32 and 33] for Western's repudiation of the contract between the parties. The District Court, in its original decision, found against Lack and held that the contract had been terminated by the earthquake results. This Court reversed that holding and held the contract to be in force and effect.

Upon return of the matter to the District Court an Interlocutory Decree was entered. [Tr. 10730, p. 12.] On behalf of Lack an Interlocutory Decree was presented, which as to the matter of damages would have referred the matter of damages to a Special Master. [Tr. 10730, p. 11, as to notice, and p. 8, as to decree.] The Court, however, chose to enter the decree signed December 20,



1940. [Tr. 10730, pp. 12-19.] In paragraph VIII of that Interlocutory Decree the District Court provided:

“That this Court retains jurisdiction for the determination of the matters herein undisposed of and the said F. S. Lack is hereby granted permission to apply for such other and further relief regarding the matters herein described and for costs of suit incurred in the District Court.” [Tr. 10730, p. 18.]

As the total of the insurance money deposited with the District Court by Pearl Assurance Company had been paid to Western on November 4, 1941 [Tr. 10158, p. 872, and Tr. 10730, p. 16] and the portion thereof awarded to Lack by this Court's decision on appeal in case number 10158 was not paid or returned to Lack until August of 1943 [Tr. 10730, p. 16], and as the matter of damages had not been disposed of, Lack made a motion to resettle and amend the Interlocutory Decree in those respects. [Tr. 10730, p. 19.]

In this motion Lack not only sought interest on his portion of the insurance money during the time Western had had same [Tr. 10730, p. 20], but sought a hearing in the District Court on the issue of damages and a reference therefor on the evidence already in and for leave to file further pleadings on the matter of damages if the District Court determined the pleadings to be insufficient. [Tr. 10730, pp. 20-22.] To this motion Western replied by a motion to strike part of Lack's proceedings [Tr. 10730, p. 25] and Western's motion was granted and Lack's motion denied. [Tr. 10730, p. 31.] As hereinbefore stated, Lack appealed from the Interlocutory Decree and from these orders and the ap-

peal was dismissed in case number 10730 of this Court on the grounds the matters were not final and therefore not appealable. *Lack v. Western*, 146 F. (2d) 852.

Again, in the District Court Lack sought to have findings and conclusions of law made on these issues [Tr. 11179, pp. 35 and 9], and for a final judgment or decree so that the issue of damages could be determined [Tr. 11179, p. 2] and the trial Court refused to make findings or conclusions and signed what is designated as a "Final Judgment", without passing upon Lack's attempts to amend the pleadings or to secure a hearing or to have the trial Court determine the matter of interest or damages. [Tr. 11179, p. 12.]

The appeal herein is from that "Final Judgment" and from the trial Court's rulings in refusing to permit amended pleadings or trial of the issue of damages or interest or any proceedings on those issues and its refusal to make findings of fact or conclusions of law. [Tr. 11179, p. 17.] The points to be urged on appeal filed by Lack correspond to the appeal. [Tr. 11179, p. 20.]

### **Lack Entitled to Findings and Conclusions of Law.**

That Lack was and is entitled to have findings of fact and conclusions of law by the trial Court is established by Rule 52 of rules of practice of Civil Proceedings.

*Edmunds Federal Rules*, Vol. 2, Rule 52.

#### *Findings by the Court:*

"(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions

the court shall similarly set forth the findings of fact and conclusions of law which constitute the ground of its action. Requests for findings are not necessary for purposes of review."

### Lack Entitled to Further Proceedings in Trial Court.

That Lack was and is entitled to further proceedings in the trial Court after this Court's decision on appeal in case number 10158 is determined by the following cases, among others:

*The Santa Maria*, 23 U. S. 431; 6 L. Ed. 359;

*Hawkins v. Blake*, 108 U. S. 422; 27 L. Ed. 775;

*Sprague v. Ticoni Bank*, 307 U. S. 161, at 166;  
83 L. Ed. 1184, at 1188;

It is, therefore, respectfully submitted that the "Final Judgment" herein should be vacated and the matter returned to the trial Court for the purpose of, 1, allowing such amendment to the pleadings of either Lack or Western as may be necessary and requested to allege the issues and supplemental issues between the parties arising since the original trial as may be needed for a full hearing. On issues other than those settled by this Court's decision in case No. 10158, and; 2, further trial proceedings as may be necessary for the taking of evidence in such issues, including interest or damages; and, 3, that the trial Court be directed to make findings of fact and its conclusions of law before judgment be entered in the matter.

Respectfully submitted,

HARRY W. HORTON,

*Attorney for Appellant, F. S. Lack.*

